moved the Ford Explorer to the same location. At that time, Sgt. Calvi detailed his drug dog around the Explorer and the dog gave a positive alert. The officers searched the vehicle and found two wrappers containing cocaine residue. The officers also found Coastal transmission fluid in the rear seat, and two keys, one of which opened the lock that had been placed on unit T-12.

A short time later, Officer Bierbrodt arrived with search warrants for units T-12 and K-3. Inside unit T-12, officers found several boxes of Coastal transmission fluid, and inside one of the transmission fluid boxes was approximately $56,000.00 in cash. Officers found a copy of the lease for the unit, which indicated the lessee was Marcus Brown. The address on the lease agreement was the same as that of the petitioner. In unit K-3, the officer found several boxes of Coastal transmission fluid, a cooler containing four kilograms of cocaine, digital scales, and a lease agreement, which indicated the lessee was Nathaniel Phillips.

After petitioner's arrest, he was brought to the Shelby County Jail and booked on Friday, December 8, 2000 at 6:24 p.m. While held at the Shelby County Jail, the Defendant made five telephone calls, between the time of 6:30 a.m. and 7:00 a.m. on Saturday, December 9. The calls were recorded and contained inculpatory statements.

Argument

I. **The mandatory minimum sentence imposed by the district court based upon its findings of drug quantity violated *Apprendi* and *Booker*, even though the sentence imposed falls within the statutory maximum.**

Petitioner argues that the district court judge is precluded from making any factual findings as to the quantity of cocaine attributed to him for purposes of determining the appropriate sentence. In the case at bar, the district court judge "found" in excess of five kilograms of cocaine to be attributable to the petitioner.[1] This judicial "finding" and subsequent sentence in excess of ten years violated petitioner's Sixth Amendment right.

United States v. Booker, 125 S.Ct. 738 (2005), made applicable to the United States Sentencing Guidelines this Honorable Court's past holding that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the

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[1]The district court considered four kilograms of cocaine found inside storage united K-3, two cocaine wrappers found inside the vehicle in which petitioner was a passenger, and deduced that the $56,000.00 in currency was representative of three additional kilograms of cocaine in determining that petitioner would be sentenced based on nine kilograms of cocaine.

defendant or proved to a jury beyond a reasonable doubt" or else the Sixth Amendment is violated. *Id.* at 756. Here, the trial jury's verdict was void of any factual determination of drug quantity. Thus, any such fact finding by the district court judge is violative of the Sixth Amendment and cannot be remedied by stating that the United States Sentencing Guidelines are merely advisory. The implications of the Sixth Amendment violation that has occurred in the case at bar is far reaching as the question becomes not about the applicable guidelines but what is appropriate *statutory* sentencing range for the petitioner.

Here, petitioner was sentenced under the mandatory Guidelines regime based, in part, on the district court's finding by a preponderance of the evidence that Petitioner conspired to possess with the intent to distribute in excess of five kilograms of cocaine. Although this amount of cocaine was set forth and charged in the indictment, the jury never made, nor was instructed to make, a finding as to the quantity of cocaine that the Petitioner possessed. Rather, the district court instructed the jury as follows:

> "You will note that the indictment charges that a particular amount of cocaine was the object of the conspiracy. It is not necessary that the government prove an exact quantity of cocaine. It is sufficient if the government proves beyond a reasonable doubt that a

measurable quantity of cocaine was the object of the conspiracy."

United States v. Norfleet, 143 Fed. Appx. 645, 655 n.5 (6th Cir. 2005) (unpublished). The Sixth Circuit held that the district court's finding of drug quantity by a preponderance of the evidence, "made when the Guidelines were mandatory, violated the Defendant's Sixth Amendment right." *Id.* at 655 n.5. The court, however, did not vacate Petitioner's sentence on this ground. The Sixth Circuit denied Petitioner's petition for rehearing on this issue. But the case was remanded on different grounds for resentencing under *Booker*.

Based on the district court's finding of the drug quantity by a preponderance of the evidence, the court sentenced Petitioner under the enhanced provision of 21 U.S.C. § 841(b)(1)(A)(ii)(II), which sets forth a mandatory minimum term of imprisonment of 10 years and a maximum sentence of life for offenses involving in excess of 5 kilograms of cocaine where, as here, the defendant does not have a prior felony drug conviction. Under § 841(b)(1)(C), which applies to offenses involving an unspecified amount of cocaine, the sentence to be imposed is not more than 20 years. There is no mandatory minimum sentence. Thus, in this case, Petitioner was sentenced under a statutory provision which required a mandatory minimum sentence which is not required by § 841(b)(1)(C) and which provided for a higher maximum sentence than that in § 841(b)(1)(C), based on the district

court's finding of drug quantity by a preponderance of the evidence.

Petitioner therefore contends not only is his Sixth Amendment right violated but also that that sentencing him to a mandatory minimum sentence pursuant to § 841(b)(1)(B) rather than sentencing him in accordance with § 841(b)(1)(C) based on the district court's finding of drug quantity by a preponderance of the evidence violated this Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), even though the sentence imposed is within the statutory maximum set forth in § 841(b)(1)(C).

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the proscribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." It is well settled that *Apprendi* is applicable to drug prosecutions under 21 U.S.C. § 841. *See United States v. Copeland*, 321 F.3d 582 (6th Cir. 2003); *United States v. Leachman*, 309 F.3d 377 (6th Cir. 2002), *cert. denied*, 538 U.S. 969 (2003); *United States v. Flowal*, 234 F.3d 932 (6th Cir. 2000), *overruled on other grounds, United States v. Leachman*, 309 F.3d 377 (6th Cir. 2002). *Copeland* explained that under *Apprendi*, where a defendant is subject to different statutory ranges based upon different elements of a crime, each and every element that can potentially increase a defendant's sentencing range must be presented to the jury and proved beyond a reasonable doubt.

321 F.3d at 601. Such is the statutory sentencing scheme set forth in 21 U.S.C. § 841(b). *See id.* As explained in *Copeland*, under the statutory scheme set forth in § 841(b),

> defendants are made subject to varying statutory ranges based upon the quantity of drugs involved. Where a defendant has a prior felony drug conviction, and possesses, manufactures, or distributes 50 grams or more of crack, he is subject to a sentence of twenty years to life. 21 U.S.C. § 841(b)(1)(A). If a defendant has a prior felony drug conviction and possesses, manufactures, or distributes 5 grams or more of crack, he is subject to a sentence of ten years to life. 21 U.S.C. § 841(b)(1)(B). If a defendant has a prior felony drug conviction and simply possesses, manufactures, or distributes "a controlled substance in schedule II," with no specified quantity, he is subject to a maximum sentence of thirty years with no statutory minimum. 21 U.S.C. § 841(b)(1)(C).

Id. at 602. The court in *Copeland* continued:

> In considering this statutory scheme under *Apprendi*, this court has held that where a defendant is sentenced under the higher tiers of this scheme, that is, §§ 841(b)(1)(A) and (B), the quantity of drugs involved must be charged in the indictment and proved beyond a reasonable doubt; otherwise, the defendant

should be sentenced to the lower sentencing range of § 841(b)(1)(C). *See Ramirez*, 242 F.3d at 352 ("[w]hen a defendant is found guilty of violating 21 U.S.C. § 841(a)(1), he must be sentenced under 21 U.S.C. § 841(b)(1)(C) unless the jury has found beyond a reasonable doubt that the defendant possessed the minimum amounts required by § 841(b)(1)(A) and § 841(b)(1)(B)"); *see also Flowal*, 234 F.3d at 936. Furthermore, where drug quantity is not proved, and a defendant is sentenced to a term of years encompassed by both the lowest and highest tiers of the scheme, this court has found that this may constitute an *Apprendi* violation if the defendant can demonstrate that he was sentenced pursuant to one of the higher tiers of the statute. *See United States v. Humphrey*, 287 F.3d 422, 450 (6th Cir. 2002) ("[I]f evidence in the record indicates that the judge thought herself constrained to sentence the defendant within the higher statutory range, such evidence will demonstrate a potential *Apprendi* violation"). Stated differently, this court has held that a defendant's rights under *Apprendi* are violated wherever he is made subject to a mandatory minimum sentence of the higher tiers of § 841(b), even where he is sentenced within range set forth in § 841(b)(1)(C).

Id.

With regard to statutory mandatory minimum sentences, however, *Copeland* held that the Supreme Court's decision in *Harris v. United States*, 536 U.S. 545 (2002), determined that *Apprendi* did not apply where the fact found does not increase the maximum statutory ranges and thus modifies its prior holdings. *Copeland* reasoned as follows:

> Recently, however, the Supreme Court has considered the application of *Apprendi* to mandatory minimum sentences. *Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406, 2414, 153 L. Ed. 2d 524 (2002). The Court concluded that a defendant's rights under *Apprendi* are not offended where a fact that is not proved beyond a reasonable doubt increases a defendant's mandatory minimum sentence but does not increase the maximum statutory range. *Id.* at 2414. The Court reasoned that while the use of a factual finding not proved beyond a reasonable doubt cannot be used to sentence a defendant beyond the applicable statutory maximum, a district court is authorized to use such a fact to sentence a defendant within a higher range as long as that sentence is also encompassed by the lower tiers of the scheme. Justice Kennedy, writing for a plurality of the Court, reasoned that[] *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravating crimeCand thus the domain of the juryCby

> those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding. *Id.* We read the Supreme Court's holding in *Harris* to modify this court's prior holdings regarding the applicability of *Apprendi* to mandatory minimums. That is, while *Harris* does not alter this court's well established principle that, where drug quantity is not proved beyond a reasonable doubt, a defendant's sentence cannot *exceed* the statutory range set forth in § 841(b)(1)(C), *Harris* does modify our prior holdings such that a defendant cannot demonstrate an *Apprendi* violation where he has been sentenced to a term of years encompassed by § 841(b)(1)(C). Thus, where a defendant is made subject to a higher range of punishment under §§ 841(b)(1)(A) and (B) but is nonetheless sentenced within the confines of § 841(b)(1)(C), his rights under *Apprendi* are not violated.

321 F.3d at 602-03 (footnote omitted).

Thus, pursuant to the holding in *Copeland*, Petitioner's sentence in this case does not violate *Apprendi* because the sentence imposed is within the statutory maximum sentence set forth in § 841(b)(1)(C), despite the fact that the sentence

imposed under § 841(b)(1)(B) includes a mandatory minimum sentence of 10 years, which is not required under § 841(b)(1)(C), and § 841(b)(1)(B) provides for a greater maximum sentence than does § 841(b)(1)(C).

Copeland's holding, however, is in conflict with those of other circuits on this issue. This conflict was discussed by the Second Circuit in *United States v. Gonzales*, 420 F.3d 111 (2d Cir. 2005). *Gonzalez* disagreed with *Copeland* and held that drug quantity must be considered an element of an aggravated offense in all cases under § 841(b)(1), including where a mandatory minimum sentence is imposed but the sentence imposed is within the statutory maximum otherwise set forth in § 841(b)(1)(C). Thus, *Gonzalez* held that *Apprendi* applied in cases such as this and that *Apprendi* is violated in such cases. The court found that *Harris v. United States*, was distinguishable and did not apply to the statutory scheme set forth in § 841(b)(1). As explained in *Gonzalez*:

> "In *Harris v. United States*, the Supreme Court considered an *Apprendi* challenge to a seven year mandatory minimum sentence imposed pursuant to 18 U.S.C. § 924(c)(1)(A) for brandishing a firearm during and in relation to a drug trafficking crime. *See* 536 U.S. at 551 52, 122 S. Ct. 2406. That statute provides three increasing mandatory minimum sentences depending on a defendant's specific firearm use, while an implicit statutory maximum of life

> imprisonment remains constant throughout. The Supreme Court ruled that firearm use was a sentencing factor rather than an element of the charged crime because facts "increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum)" may properly be determined by a judge "without violating the Constitution." *Id.* at 557, 122 S. Ct. 2406 (plurality opinion of Kennedy, J.); *see id.* at 570, 122 S. Ct. 2406 (Breyer, J., concurring in part and concurring in the judgment) ("I join [the Court's] opinion to the extent that it holds that *Apprendi* does not apply to mandatory minimums."). In so ruling, *Harris* reaffirmed *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), a pre-*Apprendi* case holding that a court rather than a jury could determine whether a defendant visibly possessed a firearm during certain felonies because the aggravating fact only triggered a mandatory minimum sentence without altering the possible maximum. *See Harris v. United States*, 536 U.S. at 568, 122 S. Ct. 24.

420 F.3d at 125-26 (footnote omitted)."

While recognizing that "[t]he logic of the distinction drawn in *Harris* between facts that raise only mandatory minimums and those that raise statutory maximums is not easily grasped," *Gonzalez* held that the case before it did not fit within the *Harris* paradigm, stating as follows:

As our earlier discussion of § 841 demonstrates, *see supra* at Part II.B.1.a, that statute, unlike 18 U.S.C. § 924(c)(1)(A), does not use a fact (drug quantity) simply to identify increasing minimum sentences within a penalty scheme with a fixed maximum. Instead, when drug quantity raises a mandatory minimum sentence under § 841, it simultaneously raises a corresponding maximum, thereby increasing a defendant's authorized sentencing range above what it would have been if he had been convicted of an identical unquantified drug crime. The *Apprendi* rule is, and after *Harris* remains, that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that *increase the prescribed range of penalties* to which a criminal defendant is exposed." *United States v. Apprendi*, 530 U.S. at 490, 120 S. Ct. 2348 (internal quotation marks omitted) (emphasis added). It would turn this rule on its head to conclude that a fact, such as drug quantity, which unquestionably increases the "range of penalties to which a criminal defendant is exposed," is not an element of the crime that must be pleaded and proved beyond a reasonable doubt (or admitted by the defendant) because it increases the mandatory minimum sentence as well as the maximum. *Harris* simply does not speak to that circumstance. It holds that, where a fact "alter[s] only the minimum" sentence, without "authoriz[ing] the judge to impose [a] . . .

> higher penalt[y]," the Constitution permits the fact to be treated as a sentencing factor. *Harris v. United States*, 536 U.S. at 554, 122 S. Ct. 2406; *cf. Jones v. United States*, 526 U.S. at 242, 119 S. Ct. 1215 (noting that *McMillan v. Pennsylvania*, 477 U.S. at 88, 106 S. Ct. 2411, suggested that proof of visible gun possession might not have been deemed a sentencing factor if it had also "exposed a defendant to a sentence beyond the maximum that the statute otherwise set without reference to that fact"). That is not this case.

Id. at 126-27 (footnote omitted). After discussing other Supreme Court precedent pertaining to *Apprendi*, *Gonzalez* stated that it could not conclude, as the government urged, that *Apprendi* and its progeny apply only to prosecutions that actually result in sentences exceeding otherwise applicable maximums. *Id.* at 129. Nor could it conclude, after *Apprendi*, that district courts are nevertheless required to treat drug quantity only as a sentencing factor for purposes of imposing § 841(b)(1)(A) and (B) mandatory minimums. *Id.* Rather,

> [t]he *Apprendi* rule applies to the resolution of any fact that would substitute an increased sentencing range for the one otherwise applicable to the case. Because mandatory minimums operate in tandem with increased maximums in § 841(b)(1)(A) and (b)(1)(B) to create sentencing ranges that "raise the limit of

> the possible federal sentence," *Shepard v. United States*, 125 S. Ct. at 1262, 125 S. Ct. 1254, drug quantity must be deemed an element for all purposes relevant to the application of these increased ranges.

Id. The court found that *United States v. Booker* further supported this conclusion.

Gonzalez recognized cases from other circuits reaching a contrary conclusion, such as *United States v. Copeland, United States v. Goodine*, 326 F.3d 26, 31-32 (1st Cir. 2003), *cert. denied*, 541 U.S. 902 (2004), and *United States v. Solis*, 299 F.3d 420, 424 (5th Cir.), *cert. denied*, 537 U.S. 1060 (2002). 420 F.3d at 130. But, the court stated, "on this point, we are more inclined toward the views of the Fourth, Ninth, and District of Columbia Circuits, *see United States v. Velasco Heredia*, 319 F.3d at 1085 87 (remanding for resentencing where court relied on judicial findings to impose mandatory minimum five year sentence under § 841(b)(1)(B) that was not in excess of maximum for unquantified offense); *United States v. Graham*, 317 F.3d 262, 275 (D.C. Cir. 2003) (remanding for resentencing where jury verdict did not support imposition of five year mandatory minimum term of supervised release pursuant to § 841(b)(1)(A), although same term could have been imposed under § 841(b)(1)(C) in court's discretion); *see also United States v. Martinez*, 277 F.3d 517, 530, 532 34 (4th Cir. 2002)

(concluding that court erred in telling a defendant who was pleading guilty that he faced a mandatory minimum sentence of ten years and a maximum of life when he, in fact, faced no mandatory minimum sentence and a maximum of twenty years, although error did not affect substantial rights), as well as those expressed by Judge Becker in *United States v. Vazquez*, 271 F.3d at 108 (Becker, J., concurring) (reviewing structure and history of § 841 and specifically rejecting argument that drug type and quantity should be treated as "element like factors only when they increase the prescribed statutory maximum penalty")."

Id. at 130-31.

"Indeed," according to *Gonzalez*,

> justice would hardly be well served by a rule that delayed the identification of one or more elements of a crime until sentencing. Prosecutors, who must draft indictments and develop evidence to meet their burden of proof; defendants and their counsel, who must decide whether to challenge the sufficiency of the government's case or pursue plea negotiations; and trial judges, who must rule on the relevancy and sufficiency of evidence, prepare jury instructions, and ensure the factual bases for guilty pleas, all need to know long before sentencing which facts must be proved to a jury and which ones can be

> reserved for resolution by the sentencing judge. *Thomas* reconstrued § 841 to provide a clear answer to this question in light of concerns raised by *Apprendi*, and we repeat the court's response today: drug quantity is an element that must always be pleaded and proved to a jury or admitted by a defendant to support conviction or sentence on an aggravated offense under § 841(b)(1)(A) or (b)(1)(B). If a defendant is convicted only on a lesser unquantified drug charge, he must be sentenced pursuant to § 841(b)(1)(C), which generally provides no mandatory minimum sentence.

Id. at 131.

Petitioner argues that *Gonzales* is the appropriate and logical extension of *Apprendi*. In light of the conflict among the circuits on the important issue presented here, this Court should grant this petition in order to resolve such conflict and hold that is *Apprendi* is violated in the situation presented here.

II. The correct remedy for a *McLaughlin* violation that occurs during the violation should be the exclusion of the evidence.

The Defendant in *United States v. Fullerton*, 187 F.3d. 587 (6th Cir. 1999), made the argument that the appropriate remedy for the failure to judicially determine probable cause

within forty-eight hours of an arrest should be the suppression of evidence obtained incident to that arrest. In *Fullerton*, Officers seized a pager from the Defendant at the time of his arrest. The Court found that this seizure occurred lawfully before the *McLaughlin* violation. Thus, the pager was not obtained pursuant to the *McLaughlin* violation. Because the evidence in question, the pager, was obtained incident to the lawful arrest and during the first forty-eight hours, the *Fullerton* Court found that "the district court properly admitted the pager at trial. Thus, while there was a *McLaughlin* violation, suppression of the pager is not the appropriate remedy." *Fullerton* at 591.

In the case at bar, your petitioner was arrested on the morning of December 8, 2000. It can be assumed that it was sometime prior to 10:40 a.m. because that is when the search warrant was signed by the judicial commissioner. Therefore, the calls were made after your petitioner had been in custody overnight for nearly 24 hours.

This distinction is paramount, unlike in *Fullerton* the evidence in this case was not seized or discovered before or during the petitioner's arrest. Petitioner was detained, arrested, and not given a bond or taken before a magistrate at all during the first 12 hours of his incarceration. He had not been advised as to what he was being charged with, by whom, and what was going to happen. In fact, he was incarcerated without any advice as to when there may be a Court appearance or bond being set. Only after being incarcerated

overnight, and approaching being in custody for 24 hours, did your appellant make the phone calls that were recorded in the jail. Then he was required to sit in jail for nearly an *additional* 48 hours before being brought before the nearest magistrate.

Defendant urges this Honorable Court to consider the issue of what is the appropriate remedy of a *McLaughlin* violation from the perspective of someone who is detained with no information as to what is occurring and is held in jail, overnight, for nearly 24 hours and ultimately nearly 72 hours before being brought before the nearest magistrate.

III. The Sixth Circuit's finding that the stop and detention of your Defendant was lawful under *Terry v. Ohio*, 392 U.S. 1 (1968) was erroneous.

Petitioner submits that the Sixth Circuit Court of Appeals erroneously found that the actions of the arresting officers in taking your Defendant from the Explorer at gunpoint, placing him on the ground, handcuffing him, and transporting him to another location were reasonable under *Terry* and did not ripen the detention into a de facto unlawful arrest.

This Honorable Court in *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1968), recognized a "narrowly drawn" exception to the probable-cause requirement of the Fourth Amendment for certain seizures of

the person that do not rise to the level of full arrests. Two justifications supported this "major development in Fourth Amendment jurisprudence." *Pennsylvania v. Mimms*, 434 U.S. 106, 115, 98 S.Ct. 330, 336, 54 L.Ed.2d 331 (1977) (STEVENS, J., dissenting). First, a legitimate *Terry* stop--brief and narrowly circumscribed--was said to involve a "wholly different kind of intrusion upon individual freedom" than a traditional arrest. *Terry*, 392 U.S., at 26, 88 S.Ct., at 1882. Second, under some circumstances, the government's interest in preventing imminent criminal activity could be substantial enough to outweigh the still-serious privacy interests implicated by a limited *Terry* stop. *Id.*, at 27, 88 S.Ct., at 1883. Thus, when the intrusion on the individual is minimal, and when law enforcement interests outweigh the privacy interests infringed in a *Terry* encounter, a stop based on objectively reasonable and articulable suspicions, rather than upon probable cause, is consistent with the Fourth Amendment.

In reviewing any *Terry* stop, the "critical threshold issue is the intrusiveness of the seizure." *United States v. Place*, *supra*, 462 U.S., at 722, 103 S.Ct., at 2653 (BLACKMUN, J., concurring in judgment). Regardless how efficient it may be for law enforcement officials to engage in prolonged questioning to investigate a crime, or how reasonable in light of law enforcement objectives it may be to detain a suspect until various inquiries can be made and answered, a seizure that in duration, scope, or means goes

beyond the bounds of *Terry* cannot be reconciled with the Fourth Amendment in the absence of probable cause. Legitimate law enforcement interests that do not rise to the level of probable cause simply cannot turn an overly intrusive seizure into a constitutionally permissible one. Moreover, a *Terry* stop valid in its inception may become unduly intrusive on personal liberty and privacy simply by lasting too long. That remains true even if valid law enforcement objectives account for the length of the individual so substantially as to need probable cause.

In the case at bar, the officers immediately stopped the vehicle in which your petitioner was riding, he was forcibly removed at gun point, placed on the ground, handcuffed, and transferred to another location. Assuming arguendo, that the initial stop was based on reasonable suspicion, the subsequent actions of the officers of "taking down" petitioner and moving him to another location were not minimally intrusive to further investigate. Further, there was no evidence throughout the proceedings below to suggest that there were co-conspirators or a heightened danger for the officers. Petitioner asserts that the Sixth Circuit's finding that it was "reasonable" to remove a detained suspect from the scene in order to "maintain the integrity of the scene" is erroneous. This could be said by law enforcement in every case involving an execution of a search warrant or seizure, and there is no basis for such action in this case.

As stated above, a seizure that in duration, scope, or means goes beyond the bounds of *Terry* cannot be reconciled with the Fourth Amendment in the absence of pr bable cause. Petitioner submits that the actions of the officer were beyond the scope of reasonableness, and beyond the bounds of *Terry*. Only until after the illegal detention, and take down of petitioner, did Officer Calvi detail his drug dog around the vehicle. According to the Sixth Circuit this was sufficient probable cause to justify the further detention of your petitioner. Petitioner argues that this occurred well after the *Terry* violation had occurred. This simply does not reconcile with this Honorable Court's holdings in determining the reasonableness of *Terry* stops. Here, the officers exceeded the scope of *Terry* and the detention of your Defendant became a de facto arrest. Because of this, all evidence seized as a result of this illegal detention should have been suppressed.

CONCLUSION

For the aforementioned reasons, pursuant to Rule 10.1, Rules of the Supreme Court, the petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Jake Erwin
Attorneys for Petitioner
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Memphis, Tennessee 38103
(901) 527-0644

APPENDIX

6TH CIRCUIT FILINGS:

Order Denying Rehearing,
filed 09/13/05 ..... A1-A1

Petition for Rehearing and
Memorandum in Support,
filed 08/25/05 ..... B1-B13

Opinion,
filed 08/10/05 ..... C1-C22

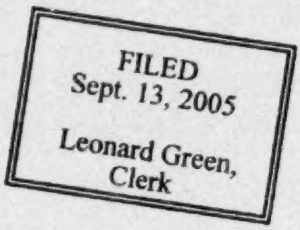
WESTERN DISTRICT OF TENNESSEE FILING:

Judgment,
filed 06/16/04 ..... D1-D8

Case Nº 04-5764

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER



UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

JERRY NORFLEET,
Defendant - Appellant

BEFORE: **KENNEDY** and **MOOR**, Circuit Judge;
RESTAINI, Judge*

It appearing that the court received a Petition for Rehearing from the appellant on 8/25/05, which was 1 day late,

It is ORDERED that the untimely Petition for Rehearing be accepted for filing.

It is further ORDERED that the Petition for Rehearing be and it hereby is **DENIED.**

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green, ds
Leonard Green, Clerk

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*The Honorable Jane A. Restani, Chief Judge for the United States Court of International Trade, sitting by designations

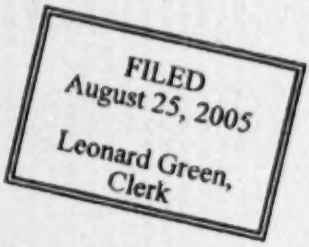
CASE NO. 04-5764

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

vs.

JERRY NORFLEET,
Defendant/Appellant.



APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT

Mr. Howard Wagerman
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(901) 527-0644

CERTIFICATE OF COUNSEL

I, Howard Wagerman and Jake Erwin, express a belief, based upon reasonable and studied professional judgment, pursuant to Rule 40 of the Federal Rules of Appellate procedure, and respectfully submit that this petition for rehearing presents questions of law that that this Honorable Court has misapprehended and/or overlooked, and therefore in the interests of justice a rehearing of this cause is necessary.

STATEMENT OF THE CASE

This case on appeal from the United States District Court for the Western District of Tennessee was presented on ora) argument before this Honorable Court, and the Court (Honorable Kennedy, Honorable Moore, and Honorable Restani), filed its opinion, on August 10, 2005. (The decision was not recommended for full text publication). The Defendant timely files this petition for rehearing on August 24, 2005.

MEMORANDUM IN SUPPORT OF PETITION

Petitioner, Jerry Norfleet, in support of the petition for rehearing would submit the following issues warrant further consideration by this Honorable Court.

I. THE DISTRICT COURT CANNOT RESENTENCE YOUR DEFENDANT WITHOUT VIOLATING HIS SIXTH AMENDMENT RIGHTS

This Honorable Court correctly noted in footnote 5 of the opinion that the jury never made or was asked to make a finding as to the quantity of cocaine that the Defendant possessed. At sentencing the District Court noted that the standard instructions were given that "it is sufficient [for conviction] if the government proves beyond a reasonable doubt that a measurable amount of cocaine was the object of the conspiracy." The District Court went on to find "by a preponderance of the evidence" that the quantity of cocaine the Defendant was responsible for exceeded five kilograms. Your appellant submits that this Honorable Court was also correct in stating that the District Court's "finding" that your Defendant was responsible for an excess of five kilograms violated the Defendant's Sixth Amendment right.

Appellant argues that the trial jury never made a finding as to what amount of cocaine for which your Defendant was responsible, the jury only found appellant guilty of a conspiracy to possess and distribute "a measurable

amount of cocaine" as instructed by the District Court. Therefore, the District Court at re-sentencing is not authorized to sentence your Defendant for any determinable amount of cocaine. Specifically, *any determination as to quantity of cocaine is a violation of appellant's Sixth Amendment right because no drug quantity was admitted by your Defendant nor was an amount established by the jury's verdict.* See *United State v. Booker*, 125 S.Ct. 738. It would be improper for the District Court to even determine an advisory sentencing guideline calculation because the trial jury made no findings as to amounts of cocaine to arrive at a base offense level.

As such, appellant submits that the District Court cannot make any factual findings with respect to the application of the guidelines and is bound by the provisions of Title 18 § 841 (b). Under the mandatory sentencing requirements of Title 21 § 84 I (b) appellant can be sentenced under one of three provisions. Generally, these provisions provide for increased penalties for defendants' in possession of increasing amounts of contraband. For example, under §841 (b)(l)(A)(ii)(II), if a jury found your Defendant guilty of possession of 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, such person shall be sentenced to term of imprisonment which may not be less than 10 years or more than life. Under §841(b)(1)(B)(ii)(II), if a jury found your Defendant guilty of possession of 500 grams or more of a mixture or substance containing a

detectable amount of cocaine, such person shall be sentenced to term of imprisonment which may not be less than 5 years or more than 40 years. Third, under §841 (b)(1)(C), a catch all provision for quantities not counted in §841 (b)(I)(A) and (B), such person shall not be sentenced to a term of imprisonment of not more than 20 years. Appellant asserts that under §841(b)(I)(C), it can be assumed that a Defendant held responsible for 5 grams of cocaine should not receive as significant a sentence as someone who possessed 499 grams.

In the case at bar, your appellant was only found guilty of possessing a "measurable amount" of cocaine, yet he was sentenced to a term of imprisonment in excess of 10 years as though he possessed *in excess of 5 kilograms*. In no way can this sentence be reconciled with *Apprendi* and *Booker* and *FanFan*. as any factor (e.g. drug quantity) that would increase your Defendant's sentence must be admitted by your Defendant or found by the trial jury. In order to sentence your appellant, an analysis of the drug quantity attributable to him must be made. It can presumed that a defendant who is responsible for excess of 5 kilograms will receive a sentence of not less than 10 years, and for a defendant found responsible for 500 grams or more would receive a sentence of not less than five years. Further, it can be presumed that someone who possessed 5 grams would receive less time than someone who possessed 499 grams. In this case, the critical issue is that the trial jury never made a determination of what

measurable amount of cocaine was attributed to your Defendant. As such, under post-*Booker* sentencing the trial court is precluded from making any such quantity determinations.

It is this sentencing conflict that requires this Honorable Court to revisit its opinion; under the pre-*Booker* mandatory guideline sentencing scheme the sentencing court could have and did make findings of drug quantities to determine the appropriate base offense level and any additional relevant conduct-and the jury instructions at the trial in this cause were sufficient at that time. However, without an admission of drug quantity by the Defendant or a finding of a quantity by the trial jury, the jury instructions at trial were insufficient under post-*Booker* analysis and *Apprendi* considerations.

This Honorable Court remanded this case for re-sentencing consistent with *Booker* and *FanFan*, yet overlooked the simple fact that the District Court *cannot make any findings with respect to the appropriate drug quantity*. Even a finding for purposes of the guidelines falls constitutionally infirm, because it would require the District Court to determine what "relevant conduct" it deemed appropriate for arriving at an "advisory" sentencing guideline computation.

Appellant argues that because Defendant cannot be sentenced without violating his Sixth Amendment rights, that the conviction must be overturned and a new trial be granted

with the requirement that the trial jury set the drug quantity attributed to your Defendant.

II. THE MCLAUGHLIN VIOLATION IN THIS CASE IS DISTINGUISHABLE FROM *UNITED STATES V. FULLERTON*, 187 F.3d 587. (6th Cir. 1999)

This Honorable Court correctly found that a McLaughlin violation had occurred due to your appellant's detention in excess of 48 hours before being brought before a magistrate. However, appellant urges this Court to note that the facts of this case are distinguishable from *Fullerton* and thus the appropriate remedy for the violation should be the exclusion of the jail recordings.

There is much confusion over the appropriate remedy for a *McLaughlin* violation. The Supreme Court has specifically declined to address this issue. *Powell v. Nevada*, 511 U.S. 79, 85, 114 S.Ct. 1280, 128 L.Ed.2d 1 (1994). The Defendant in *Fullerton* made the argument that the appropriate remedy for the failure to judicially determine probable cause within forty-eight hours of an arrest should be the suppression of evidence obtained incident to that arrest. In *Fullerton*, Officers seized a pager from the Defendant at the time of his arrest. The Court found that this seizure occurred lawfully before the *McLaughlin* violation. Thus, the pager was not obtained pursuant to the *McLaughlin* violation. Because the evidence in question, the pager, was obtained

incident to the lawful arrest and during the first forty-eight hours, the *Fullerton* Court found that "the district court properly admitted the pager at trial. Thus, while there was a *McLaughlin* violation, suppression of the pager is not the appropriate remedy." *Fullerton* at 591.

In the case at bar your Defendant was arrested on the morning of December 8, 2000. It can be assumed that it was sometime prior to 10:40 a.m. because that is when the search warrant was signed by the judicial commissioner. (This Court has found that the Defendant was lawfully arrested when the officers found the narcotics wrappers in the vehicle in which the Defendant was a passenger. This occurred prior to the search warrant being returned to the U-Store facility). Therefore, the calls were made after your Defendant had been in custody overnight for nearly 24 hours.

This distinction is paramount, unlike *Fullerton* the evidence in this case was not seized or discovered during the appellant's arrest. Your appellant was detained, arrested, and not given a bond or taken before a magistrate at all during the first 12 hours of his incarceration. He had not been advised as to what he was being charged with, by whom, and what was going to happen. In fact, he was incarcerated without any advice as to when there may be a Court appearance or bond being set. Only after being incarcerated overnight, and approaching being in custody for 24 hours, did your appellant make the phone calls that were recorded in the jail. Then he

was required to sit in jail for nearly an *additional* 48 hours before being brought before the nearest magistrate.

To not suppress this evidence that was derived during the time period of the *McLaughlin* violation, defeats its purpose. Law enforcement would be encouraged to arrest suspects, detain them without notice as to bond, and hope that the pressure of not knowing the extent of the circumstances that a suspect was in would result in a suspect doing just as the Defendant in this case did. That is to make phone calls or take other actions that would ultimately be used against the Defendant in trial.

Defendant urges this Honorable Court to look at the issue from the perspective of someone who is detained with no information as to what is occurring and is held in jail, over night, for nearly 24 hours and ultimately nearly 72 hours before being brought before the nearest magistrate and consider that the appropriate remedy for evidence derived during the occurrence of the *McLaughlin* violation be suppression of that evidence.

III. THIS HONORABLE COURT'S FINDING THAT THE STOP AND DETENTION WAS LAWFUL WAS BASED UPON AN INCORRECT FACTUAL DETERMINATION.

In describing the events leading up to the arrest of your Defendant this Honorable Court stated that "[t]he officer followed the Explorer which stopped in front of T building."

(Court of Appeals Opinion at page 3). The proof presented established that the Explorer never stopped at building T or unit 12. In questioning Officer Mark M. Calvi during the Suppression Hearing on June 19, 2003, defense counsel referred to Officer Calvi's testimony made during the preliminary hearing on May 28, 2001. Officer Calvi stated in that May 28th hearing, under oath, that the Explorer "was *about to stop* when we pulled in, and that is when they started to pull forward again and we blocked their exit." (Suppression Hearing Transcript at page 115, line 8-10)(emphasis added). The vehicle was traveling around the U-Store facility in the direction of building T, but that is also the same direction as several other buildings and units. The vehicle was blocked in by officers, and at that time, the vehicle came to a stop.

IV. THE ACTIONS OF THE ARRESTING OFFICERS OF TAKING YOUR DEFENDANT TO ANOTHER LOCATION WERE NOT REASONABLE OR CONSISTENT WITH THE STANDARDS OF REASONABLENESS UNDER *TERRY v. OHIO.*

Appellant submits that this Honorable Court incorrectly found that the actions of the arresting officers in taking your Defendant from the Explorer at gunpoint, handcuffing him, and transporting him across the street did not ripen the detention to a de facto unlawful arrest. Appellant can find no authority that supports the proposition that it is reasonable to remove a detained suspect from the

scene in order to "*maintain the integrity of the scene.*" This could be said by law enforcement in, every case involving an execution of a search warrant, and there is no basis for such action in this case.

Moreover, Defendant submits that this Honorable Court made this determination with absolutely no facts in evidence to suggest that there were other co-conspirators or anyone else for the matter that would appear on the scene. As such, the removal of your Defendant was not reasonable under *Terry*.

CONCLUSION

The Appellant respectfully submits for the foregoing reasons that the opinion of the Honorable Court overlooked crucial legal and factual issues, and he urges that his petition to rehear be granted and this case be reconsidered and remanded for a new trial.

Respectfully Submitted,

/s/ Howard L. Wagerman

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CERTIFICATE OF SERVICE

I, Howard L. Wagerman, certify that I have delivered a copy of the foregoing Petition for Rehearing and Memorandum in Support to Mr. Tom Colthurst, Assistant United States Attorney, 8th Floor, Federal Building, 167 N. Main St., Memphis, Tennessee,38103.

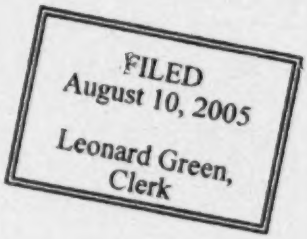
This the 24th day of August, 2005.

/s/ Howard L. Wagerman
Howard Wagerman

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 04-5764

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT



UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JERRY NORFLEET,
Defendant-Appellant.

One Appeal from the
United States District Court for the
Western District of Tennessee

Before: **KENNEDY** and **MOORE,** Circuit Judges; and **RESTANI,** Judge.*

KENNEDY, Circuit Judge. The Defendant appeals his conviction and sentence for conspiracy to possess with intent to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. § 846, the object of which was the

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*The Honorable Jane A. Restani, Chief Judge for the United States Court of International Trade, sitting by designation.

commission of an offense in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The Defendant raises the following arguments. First, he claims that the district court erred in denying his motion to suppress all physical evidence on the ground that he was unlawfully seized when the vehicle in which he was a passenger was stopped without reasonable suspicion of criminal wrongdoing, and that, even if reasonable suspicion did exist to stop the vehicle, his subsequent detention ripened into an unlawful arrest without probable cause. The Defendant argues that the district court also erred in denying his motion to Suppress recorded telephone conversations he made while in jail because, he asserts, the recorded conversations were obtained as a result of a *McLaughlin* violation since he was detained for more than forty-eight hours without being brought to a magistrate for a probable cause determination. Next, the Defendant asserts that the government presented insufficient evidence for any rational trier of fact to find him guilty. Finally, the Defendant contends that the district court erred in enhancing his sentence for obstruction of justice and in calculating his base offense level under the guidelines. For the following reasons, we AFFIRM the Defendant's conviction, VACATE the Defendant's sentence, and REMAND for re-sentencing consistent with *United States v. Booker*, 125 S. Ct. 738 (2005).

BACKGROUND

On the evening of December 7, 2000, Sergeant Mark Calvi, a drug detector dog handler, received information that an employee of the U-Stor storage facility in Shelby County, Tennessee, discovered a large sum of cash hidden inside unit T-12 at the U-Stor facility. Since the storage unit's lessee had become delinquent in his payments, a U-Stor employee sought to determine if the lessee had vacated the unit. To do so, the employee cut off the lessee's lock, opened the unit's gate, discovered that the unit had not been vacated, and replaced the lessee's lock with one U-Stor's locks.[1] On the morning of December 8, 2000, Sgt. Calvi detailed his drug detection dog on various units in the U-Star facility and received a positive alert on two units, unit T-12 and unit K-3. After receiving these positive alerts, Sgt. Calvi contacted Officer Bierbrodt and requested that he obtain search warrants for those units. He also contacted additional officers to assist him in executing the warrant upon its receipt. These officers positioned themselves in a parking lot of a grocery store

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[1]U-Stor employees find that it is common for lessees who have vacated their units to nonetheless place their lock on the unit after vacating. If, after removing the lessee's lock, the U-Stor employee finds that the lessee has not vacated the unit, then the U-Stor manager will write to the lessee informing him that he must either pay up on the unit or remove his contents or that the contents will be auctioned off .

adjacent to the U-Stor facility. Meanwhile, the manager of the U-Stor told Sgt. Calvi that some men had come to the U-Stor office on the evening of December 7, 2000, and paid cash to restore the lease on unit T-12. The manager described the vehicle they were driving as a "gold SUV type vehicle." The men also purchased a new lock from the U-Stor facility. After paying up on the unit and purchasing the new lock, the men requested that they be allowed to put their new lock on the unit. Although the men were permitted to put their lock on the unit, which they did, the manager informed them that they still could not immediately gain access to the unit's contents since only the regional manager had the key to the lock that the U-Stor employee had put on the unit that morning, and that he, the local manager, would not be able to get that key until the next day.

While the officers waited for the search warrant, a bronze or gold Ford Explorer drove up to the U-Stor lot and stopped at the entrance gate. The manager told Sgt. Calvi that he be believed that this vehicle was the same one that he had seen the previous day when the men had renewed unit T-12's lease. To gain access to the storage facility, one has to input a code at the entrance gate. Each storage unit is assigned a unique code. The driver entered a valid code. Later, the officers learned that the driver had entered the code assigned to unit K-3, the other unit to which the drug detection dog had alerted. After gaining entrance, the Explorer drove toward building T. Sgt. Calvi then called the other officers in to do

a take-down to investigate the occupants of the SUV. The officers followed the Explorer which stopped in front of the T building. After positioning vehicles both in front and behind the Explorer to prevent any potential escape, the officers approached the Explorer with their guns drawn, ordered the occupants, who consisted of the driver, Darelle Jones, and the lone passenger, the Defendant, from the vehicle, patted them down, handcuffed them, and placed them in one of the officers' vehicle. In order to secure the scene, the officers transported the Explorer, Jones, and Defendant to the parking lot of the grocery store across the street. When they arrived at the grocery store parking lot, Sgt. Calvi detailed his narcotics detection dog around the Ford Explorer and the dog gave a positive alert. The officers searched the vehicle and found two kilogram wrappers containing cocaine residue. The officers also found Coastal transmission fluid in the rear seat, and two keys, one of which opened the lock that had been placed on unit T-12 the day before.

A short time later, Officer Bierbrodt arrived with search warrants for units T-12 and K-3. Inside unit T- 12, officers found several boxes of Coastal transmission fluid, and inside one of the transmission fluid boxes was approximately $56,000 in cash. Officers found a copy of the lease for the unit, which indicated the lessee was Marcus Brown. The address on the lease agreement was the same address as the Defendant's. In unit K-3, the officers found several boxes of Coastal transmission fluid, a cooler

containing four kilograms of cocaine, digital scales, and a lease agreement, which indicated the lessee was Nathaniel Phillips.

After his arrest, the Defendant was brought to Shelby County Jail and booked on Friday, December 8, 2000, at 6:24 p.m. While held at the Shelby County jail, the Defendant made five telephone calls, all between the time of 6:30 a.m. and 7:00 a.m. on Saturday, December 9. The calls were recorded and contain numerous inculpatory statements. There are several signs posted near the telephones at the jail that notify the inmates that their telephone calls are subject to monitoring and recording. Moreover, when the recipient of an inmate's call accepts the call (all calls from the jail are collect calls), an audible recording is heard by both participants to the call that informs them that the call is subject to monitoring and recording.

After the jury found the Defendant guilty of conspiracy to possess with intent to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. § 846, 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, this appeal followed

ANALYSIS

I.. Motions to Suppress

A. Physical Evidence

We first consider whether the district court erred in denying the Defendant's motion to suppress all physical evidence on the ground that the officers lacked reasonable

suspicion to detain the vehicle in which the Defendant was a passenger, and that the Defendant's detention ripened into an unlawful arrest.[2] We review a district court's factual findings concerning a motion to suppress for clear error and its determination as to the existence of reasonable suspicion *de*

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[2]The Defendant also argues that the physical evidence should not have been admitted at trial because, he contends, the government failed to establish chain of custody over the evidence. We review this claim for abuse of discretion, *United States v. Levy*, 904 F.2d 1026, 1030 (6th Cir. 1990). The Defendant argues that although Detective Selby was the evidence custodian in this case, the government established custody only through the testimony of Officer Bierbrodt, whose name did not appear anywhere on the evidence tags. Physical evidence is admissible when the possibilities of alteration or misidentification "are eliminated, not absolutely, but as a matter of reasonable probability." *United States v. McFadden*, 458 F.2d 440, 441 (6th Cir. 1972). The district noted that since Detective Selby had died before trial, the government could establish custody through someone who had personal knowledge of the transactions that Detective Selby recorded. The government offered Officer Bierbrodt as someone who had personal knowledge of Detective Selby's handling of the evidence in this case. The district court concluded that since the government was able to account for each time period of custody regarding the evidence in this case, it eliminated as a matter of reasonable probability that the evidence was somehow altered or misidentified. The district court did not abuse its discretion in reaching this conclusion.

novo. *United States v. Jacob*, 377 F.3d 573, 577 (6th Cir. 2004).

An investigatory stop of a vehicle is permissible under the Fourth Amendment if supported by reasonable suspicion of criminal wrongdoing. *Terry v. Ohio*, 392 U.S. 1, 22 (1968). Since an investigatory stop is less intrusive to one's personal, security than an arrest, the level of suspicion necessary for such a stop is thus "considerably less than proof of wrongdoing by a preponderance of the evidence." *United States v. Sokolow*, 490 U.S. 1, 7 (1989). For purposes of determining whether reasonable suspicion exists, the Supreme Court has instructed that a reviewing court must consider the "totality of circumstances ... to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." *United States v. Arivizu*, 534 U.S. 266, 273 (2002) (quotation marks omitted).

The Defendant argues that the district court erred in denying his motion to suppress all physical evidence since, he claims, the officers lacked reasonable suspicion to stop the vehicle in which he was a passenger. Thus, we must consider whether the Defendant was unlawfully detained, and, if so, whether the discovered evidence was a fruit of that unlawful detention. *United States v. Smith*, 263 F.3d 571, 594 (6th Cir. 2001); *United States v. Shareef*, 100 F.3d 1491, 1500 (10th Cir. 1996). Because we conclude that the Defendant was not

unlawfully detained, we need not address whether the discovered evidence was a fruit of an unlawful detention.[3]

It is clear, in considering all the factors that the officers had reasonable suspicion to stop the vehicle in which the Defendant was a passenger. After receiving the information that a large amount of cash was discovered in unit T-12 at the U-Stor facility by one of its employees, Sgt. Calv's drug detection dog gave a positive indication to the odor of narcotics in that unit. The U-Stor facility manager told Sgt. Calvi that men in a gold SUV type vehicle had come to the U-Stor facility the previous night to pay up on that unit While Sgt. Calvi was with the U-Stor manager, a gold Ford Explorer entered a valid access code at the entry gate and entered the facility. The manager told Sgt. Calvi that that vehicle was the same one he had seen the previous night.

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[3]Although the Defendant in his brief argues that all the physical evidence should have been suppressed, we note that even if we were to hold, *infra*, that the Defendant was unlawfully detained, that conclusion would not require the suppression of all the physical evidence. First, the evidence obtained from the storage units was not a fruit of the Defendant's claimed unlawful detention as a search warrant had already been sought for those units at the time of his detention. Moreover, the Defendant lacks standing to argue that the search itself of the Explorer was unlawful. He can of course, and he does, argue that the evidence obtained from the Explorer was a fruit of his purported unlawful detention.

Upon receipt of this information, the officers followed the Ford Explorer, which drove to building T. At this point, the officers seized the vehicle. Clearly, at the moment the officers seized the vehicle, reasonable suspicion existed to believe that the men in the Ford Explorer were possibly engaged in criminal wrongdoing since a reasonable officer could conclude that the men were associated with unit T-12, which they had been told by the facility's manager contained a significant sum of cash, and to which a drug detection dog had given a positive indication of the presence of narcotics.

The Defendant also argues that even if there were reasonable suspicion to detain the vehicle, his subsequent detention ripened into an unlawful arrest without probable cause since the officers approached the vehicle he was in with their guns drawn, ordered the occupants out of their vehicle, handcuffed them placed them in back of a patrol car, and drove them to the parking lot of a grocery store next to the U-Stor facility. Whether a detention based upon reasonable suspicion ripens into an unlawful arrest without probable cause depends upon whether the officers' conduct in detaining a defendant and in investigating the suspected crime was reasonable under the circumstances. *United States v. Sharpe*, 470 U.S. 675, 683 & 686 (1985); *Jacob*, 377 F.3d at 579 (noting that, in determining whether a detention ripens into an unlawful arrest, the issue is "whether the investigators' conduct in detaining the defendants and in pursuing a means of investigation that was likely to confirm or dispel their

suspicions quickly was reasonable under the circumstances"). Moreover, we have noted, "the degree of force utilized by officers during a detention must be 'reasonably related in scope to the situation at hand.'" *United States v. Heath*, 259 F.3d 522, 530 (6th Cir. 2001) (quoting *United States v. Hardnett*, 804 F.2d 353, 356-57 (6th ir. 1986)).

The officers' decision to approach the vehicle with their guns drawn, order the men out of the vehicle, pat them down for weapons, and to handcuff them was reasonable, as concern for the officers' safety was at its height under those circumstances. This Court has concluded that officers who stop a person who is reasonably believed to be either carrying or dealing drugs "are entitled to rely on their experience and training in concluding that weapons are frequently used in drug transactions,' and to take reasonable measures to protect themselves." *Jacob*, 377 F.3d at 579 (quoting *Heath*, 259 F.3d at 530). It was also reasonable under the circumstances for the officers to place the Defendant and Jones in a patrol car and to move them across the street in order to maintain the integrity of the scene where the search warrant would be executed and to clear the scene in case someone else, such as a co-conspirator, drove up, during the ongoing investigation. When the officers moved the Defendant, the driver, and the vehicle across the street, Sgt. Calvi promptly detailed his drug detection dog around the vehicle and received a positive alert. This provided the officers with probable cause to search the vehicle. Upon the search of the vehicle, the officers

discovered kilogram cocaine wrappers and a key to unit T-12. At this point, the officers had probable cause for the Defendant's arrest. Since the officers' conduct in detaining the Defendant and in pursuing a means of investigation that was likely to confirm or dispel their suspicions quickly was reasonable under the circumstances, we conclude that the Defendant's detention did not ripen into an unlawful arrest.

B. Recorded Jail Telephone Conversations

We next consider whether the district court erred in denying the Defendant's motion to suppress all the recorded telephone calls he made while in jail. The Defendant submits that, since he was not arrested pursuant to a warrant, the failure to bring him in front of a magistrate within forty-eight hours after his arrest for a probable cause determination violated the Fourth Amendment. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991). The Defendant argues that "but for this illegal detention, the government would not have been able to obtain the jail house recordings."

The Supreme Court has concluded that although the Fourth Amendment permits warantless arrests, persons arrested without a warrant must be promptly brought in front of a magistrate for a probable cause determination. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). In *McLaughlin*, the Court defined what is "prompt" under *Gerstein*. 500 U.S. at 47, 56. The Court concluded that "a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest

will, as a general matter, comply with the promptness requirement of *Gerstein*." *McLaughlin,* 500 U.S. at 56. The Court went on to note that when "an arrested individual does not receive a probable cause determination within 48 hours, ... the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance." *Id.* at 57.

The Defendant was booked into the Shelby County Jail at 6:24 p.m. on Friday, December 8, 2000. He was not taken before a magistrate until 10:28 a.m., on Monday, December 11,2000. Thus, he was detained without a probable cause determination for sixty-four hours.[4] Since the Defendant was held in excess of forty-eight hours without a judicial determination as to probable cause, the burden shifts to the government to demonstrate an extraordinary circumstance to justify the delay. It has failed to do so. The fact that the Defendant's detention occurred over a weekend

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[4] Although the record indicates that he was booked at 6:24 p.m. on Friday, December 8, it does not indicate when he was actually arrested, which would have occurred when the officers discovered the cocaine wrappers and residue in the Ford Explorer. Obviously, this occurred sometime before he was booked. Since the clock for determining whether an arrested individual received a "prompt"judicial determination of probable cause starts running the moment the individual is arrested, the Defendant was held without a judicial determination of probable cause for some amount of time in excess of sixty-four hours.

is not an excuse. *See Id.* (noting that intervening weekends do not qualify as an extraordinary circumstance). We conclude, therefore, that the Defendant's Fourth Amendment right to be free from unreasonable seizures, as set forth in *McLaughlin*, was violated.

This conclusion, however, does not dictate that the Defendant's recorded conversations made while in jail must be suppressed. The Defendant made the five telephone calls over a half hour time period from 6:30 a.m. to 7:00 a.m. on Saturday December 9th, 2000. When he made these calls, he had only been in custody for a little over twelve hours. Since these telephone calls were made before the *McLaughlin* violation occurred, they cannot be a fruit of his unlawful detention, as his detention did not become unlawful until approximately thirty-six hours after he made the calls. *See United States v. Fullerton*, 187 F.3d 587, 591 (6th Cir. 1999) (concluding that the suppression of evidence obtained before the occurrence of a *McLaughlin* violation is not appropriate since such evidence is not obtained as a result of the violation).

II. Sufficiency of Evidence

We next consider whether the government offered sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that the Defendant both conspired to distribute in excess of five kilograms of cocaine and aided and abetted the possession of a controlled substance intended

for distribution. When a defendant challenges his conviction on the basis of insufficiency of the evidence, we must determine "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Bashaw*, 982 F.2d 168, 171 (6th Cir. 1992) (internal quotation marks and citation omitted). Moreover, we draw all reasonable inferences from the evidence in favor of the government. *Id.*

To convict the Defendant of conspiring to distribute a controlled substance and aiding and abetting the possession of a controlled substance intended for distribution, the government must establish the following. First, to sustain a drug conspiracy conviction under 21 U.S.C. § 846, the government must prove beyond a reasonable doubt "that a conspiracy existed, that the accused knew of the conspiracy, and that [the accused] knowingly and voluntarily joined it." *United States v. Avery*, 128 F.3d 966, 970 (6th Cir. 1997). The government need not prove the existence of a formal agreement; rather, "a tacit or material understanding among the parties will suffice." *Id.* at 970-71. "The existence of a conspiracy may be inferred from circumstantial evidence that can reasonably be interpreted as participation in the common plan." *Id.* at 971. Next, to sustain the aiding and abetting the possession of a controlled substance for distribution charge under 18 U.S.C. § 2, the government must prove that the Defendant knew that the principal possessed drugs with intent

to distribute and that the Defendant assisted in the distribution plan. *United States v. Pena*, 983 F.2d 71, 72 (6th Cir. 1993).

The Defendant argues that the government presented insufficient evidence to support a finding of guilt on either the charge of conspiring to distribute in excess of five kilograms of cocaine or on the charge of aiding and abetting the possession of cocaine intended for distribution. The Defendant asserts that the evidence presented at trial establishes that the Defendant was merely riding in Jones' vehicle. He notes that mere association with someone who possesses or deals drugs is insufficient to prove a conspiracy. *See United States v. Gibbs*, 182 F.3d 408, 422 (6th Cir. 1999).

We conclude that the government offered sufficient evidence for a rational trier of fact to find the Defendant guilty beyond a reasonable doubt of both conspiracy to distribute in excess of five kilograms of cocaine and of aiding and abetting the possession of cocaine intended for distribution. The government introduced evidence connecting the Defendant to both units T-12 and K-3. Upon search of the Explorer, officers not only discovered a key to the lock on unit T-12, a unit which contained $56,000 in cash and Coastal transmission fluid boxes, but also kilogram cocaine wrappers and additional Coastal transmission fluid boxes. Although the lease agreement for unit T-12 named Marcus Brown as the lessee, the address on the agreement was the same as the Defendant's.

Most damaging to the Defendant's sufficiency argument, however, are the recordings of the five calls that he made while in jail. In the first recorded call, the Defendant instructs a female friend to tell "Mar" to deny knowledge of Nathaniel Williams and to have Mar say that he got the storage unit in November and that some money was seized from it. He further instructs his female friend to inform Mar to deny having any knowledge as to what was in the storage unit. The Defendant also instructs her to tell Mar that "they" are going to ask Mar who the Defendant is and why Mar and the Defendant have the same address. The Defendant tells her what Mar should say if questioned. The Defendant also instructs her to tell Mar to say that Mar got the storage unit to store lawnmower equipment. Moreover, he instructs her to say that he works in landscaping and to tell Marcus that "they" had to cut the locks in the storage room, because they did not find keys.

In the second telephone call, the Defendant instructs his female friend to hide money and to remove a gun from the house and throw it in the garbage somewhere. He also tells her to tell Marlo to say that he (Marlo) does not know Nathaniel Williams, and to tell individuals that "we ain't snitched on them." He further expresses his desire to have individuals deny knowledge as to drug dealing. In other calls played for the jury, the Defendant requests his female friend to tell individuals to deny knowing Marcus Brown or Nathaniel Williams and that Nathaniel's name is not

Nathaniel Williams, but Nathaniel Phillips. Moreover, the Defendant requests that evidence that might connect him to the storage unit be removed.

From these calls, and from the physical evidence introduced, a juror could certainly conclude that the Defendant not only participated in a conspiracy to distribute cocaine, but also sought to have it succeed. In light of this evidence, we conclude that the government introduced sufficient evidence for a rational trier of fact to find the Defendant guilty beyond a reasonable doubt.

III. Sentencing

The Defendant argues that the district court erred in both calculating his base offense level and in enhancing his sentence for obstruction of justice. While this case was on appeal, the Supreme Court decided *United States v. Booker*, 125 S.Ct. 738, which held that the Sixth Amendment as construed in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), applied to the federal sentencing guidelines. 125 S. Ct. at 755-56. Thus, *Booker* made applicable to the Guidelines the Supreme Court's past holding that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt" or else the Sixth Amendment is violated. *Id.* at 756. Since the Defendant failed to raise a *Blakely/Booker* challenge to his

sentence in district court, we can reverse only upon a showing of plain error. *Webb*, 403 F.3d at 380.

In this case, the district court found, based upon the telephone calls that the Defendant made while in jail, that the Defendant obstructed the administration of justice and increased the Defendant's offense level by two levels pursuant to U.S.S.G. § 3C1.1. Thus, based on facts that were neither admitted by the Defendant nor presented to a jury, the applicable sentencing range was increased. The district court's reliance on judge-found facts to increase the Defendant's sentence violated the Sixth Amendment. We thus vacate the Defendant's sentence and remand for re-sentencing. *See United States v. Oliver*, 397 F.3d 369,378.

While remand for re-sentencing is required under *Booker*, we consider the Defendant's claims regarding the district court's application of the Guidelines since the district court will need to consider the correct Guideline-recommended sentence in fashioning its own post-*Booker* sentence on remand. *See United States v. McDaniel*, 398 F.3d 540, 551 (6th Cir. 2005).

The Defendant's claims that the district court erred in applying the Guidelines are without merit. The Defendant first argues that the district court erred in applying the obstruction of justice enhancement pursuant to U.S.S.G. § 3C1.1. Section 3C1.1 provides for a two-level increase if a defendant "willfully obstructed or impeded ... the administration of justice during the investigation, prosecution,

or sentencing of the instant offense." After reviewing the transcripts of the phone calls that the Defendant made in jail, the district court concluded that the Defendant clearly attempted to obstruct justice. In the phone calls, the Defendant consistently requested that his female friend assist him in providing false information and suborning perjury. The Defendant offers no argument in refutation. The district court did not err in applying the enhancement.

The Defendant also argues that the district court erred in assigning him a base offense level of 32. A defendant is assigned a base offense level of 32 when it is found that he possessed at least five but less than fifteen kilograms of cocaine. U.S.S.G. § 2D1.1(c)(4). In finding a base level of 32, the district court found that the Defendant was responsible for at least five kilograms of cocaine, and thus fell within § 2D1.1(c)(4)'s five to fifteen kilogram range.[5] In addition to

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[5]Although the indictment on which the jury found the Defendant guilty charged the Defendant with conspiring to possess with intent to distribute *in excess of five kilograms* of cocaine, the jury never made (or was asked to make) a finding as to the quantity of cocaine that the Defendant possessed. Rather, the district court judge instructed the jury as follows: "You will note that the indictment charges that a particular amount of cocaine was the object of the conspiracy. It is not necessary that the government prove an exact quantity of cocaine. It is sufficient if the government proves beyond a reasonable doubt that a measurable quantity of cocaine was the object of the conspiracy." Prior to the giving of these

the four kilograms of cocaine found in unit K-3, the district court found that the Defendant could be held responsible for either an additional two kilograms of cocaine due to the two individual kilogram wrappers found in the Explorer or for an additional three kilograms of cocaine due to the $56,000

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instructions, the parties had agreed to bifurcate the conspiracy charge issue from the quantity issue. That is, if the jury found the Defendant guilty on the conspiracy charge, the parties then planned to have the jury decide the quantity of cocaine the Defendant possessed. After the Defendant was found guilty, however, the jury was never asked to find the quantity of cocaine the Defendant possessed. At the sentencing hearing, Defendant's counsel noted to the judge that "we did not ask [the jury] to make a specific finding as to quantity." The district court judge replied that the indictment, which he read to the jury, charged that the Defendant conspired to distribute in excess of five kilograms of cocaine "but, of course, when we gave the instructions [to the jury]. we talked about the standard instructions." The judge continued by noting that "[i]t is sufficient [for conviction] if the government proves beyond a reasonable doubt that a measurable amount of cocaine was the object of the conspiracy, and that was stated ... and I think everybody was clear that that was the instruction that was desired in the case." The district court judge went on to find "by a preponderance of the evidence" that the quantity of cocaine the Defendant was responsible for exceeded five kilograms. This finding then, made when the Guidelines were mandatory, violated the Defendant's Sixth Amendment right.

seized in unit T-12, which converted into three kilograms of cocaine. The Defendant asserts that the district court erred in holding him accountable for three kilograms of cocaine because of the $56,000 found in unit T-12 and for two kilograms of cocaine because of the two kilogram cocaine wrappers discovered in the Explorer. He only argues, however, "that there was insufficient evidence ... linking Defendant's alleged drug activities to the money." He does not explain why it was erroneous for the district court to hold him accountable for two kilograms due to the two individual kilogram wrappers found in the Explorer. Thus, even excluding the "cash equivalent" three kilograms, the Defendant would still have been held accountable for 6 kilograms of cocaine, which would have resulted in the same base level of 32, since 6 kilograms falls within the 5 to 15 kilogram range provided by U.S.S.G. § 2D1.1 (c)(4). In any event, the district court properly held the Defendant accountable for the "cash equivalent" three kilograms because, as outlined above in the Sufficiency section of this opinion, the government offered sufficient evidence for the district court to conclude that the money seized was linked to the Defendant's drug activities.

IV. For the foregoing reasons, we AFFIRM the Defendant's conviction, VACATE the Defendant's sentence, and REMAND for re-sentencing in light of this opinion and the Supreme Court's opinion in *Booker*.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
MEMPHIS DIVISION

FILED
May 16, 2004
Western District
of Tennessee,
Clerk

UNITED STATES OF AMERICA

-v- **2:01CR20272-02-MI**

JERRY NORFLEET

Howard Wagerman, Retained
Defense Attorney
200 Jefferson Avenue, #1313
Memphis, TN 38103

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant was found guilty on Count 1 of the Indictment on March 16, 2004. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense
21 U.S.C. § 846	Conspiracy to Possess with Intent to Distribute in Excess of 5 Kilograms of Cocaine

Date Offense Concluded	Count Numbers
12/08/2000	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. 409-17-5462
Defendant's Date of Birth: 08-30-1969
Deft's U.S. Marshal No.: 180-67076

Defendant's Mailing Address:
4376 Willow
Memphis, TN 38117

Date of Imposition of Sentence:
June 16, 2004

/s/ Jon Phipps McCalla
JON PHIPPS MCCALLA
UNITED STATES DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 15 Years and 6 Months.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By: _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shan submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthful all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
5. The defendant shall notify the probation officer **ten(10) days prior** to any change in residence or employment;
6. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;
7. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
8. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
9. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in

plain view by the probation officer;

10. The defendant shall notify the probation officer within **72 hours** of being arrested or questioned by a law enforcement officer;

11. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

12. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

13. If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1. The defendant shall submit to drug testing and drug treatment programs as directed by the Probation Office.
2. The defendant shall seek and maintain full-time employment.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S,C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment	Total Fine	Total Restitution
$100.00		

The Special Assessment shall be due immediately.

FINE

No fine imposed.

RESTITUTION

No Restitution was ordered.